

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue date: 03May2002

In the Matter of:

RUTH B. HESS, Widow of
WILLIAM E. HESS, Dec'd.,
Claimant,

v.

DOMINION COAL CORP,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

Ron Carson,
Lay Representative for the Claimant

Russell Vern Presley, II, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

Statement of the Case

This proceeding involves a request for modification of a survivor’s claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the “Act”), and the regulations promulgated

thereunder.¹ Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the United States Court of Appeals for the Sixth Circuit as the Miner was last employed in the coal industry in Tennessee. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-202 (1989) (*en banc*).

The Miner, William E. Hess, died on April 30, 1999 from cardiopulmonary arrest and massive myocardial infarction (D-4). His first claim for black lung benefits was filed on March 20, 1973, and finally denied by the District Director on May 18, 1981 (D-40-1, 40-12). The District Director found that the Miner failed to establish all elements of entitlement. The Miner did not request a hearing and his claim was administratively closed. The Miner filed a subsequent or duplicate claim on September 11, 1996, which was denied by the District Director on March 13, 1997 (D-41-1, 41-14). The Miner did not request a hearing and his subsequent claim was administratively closed. The Claimant, the Miner's widow, Ruth B. Hess, filed for Federal Black Lung Survivor Benefits on July 28, 1999 (D-1). The District Director denied the claim on October 27, 1999, based on its finding that the evidence did not establish that the Miner's death was due to pneumoconiosis (D-26). The Claimant did not timely appeal the District Director's decision, but submitted new evidence and filed a request for modification on September 11, 2000 (D-33). The District Director denied the request for modification on December 12, 2000, finding that review of the newly submitted and prior evidence did not indicate a mistake in a determination of fact or that a material change in condition had occurred since the prior denial (D-35). By letter dated December 15, 2000, Claimant requested a formal hearing (D-36).

The claim was referred to the Office of Administrative Law Judges on March 27, 2001 (D-43). In response to a Notice of Hearing dated August 6, 2001, the Claimant requested that she be allowed to waive an oral hearing and that the decision be made on the evidence of record. The Employer, Dominion Coal Corp., did not object, and, accordingly, the request was granted and the record closed on October 29, 2001. The evidentiary record contains Director's Exhibits one (1) through forty-three (43) and Employer's Exhibits one (1) and two (2).

Issues

¹ All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-," and the Employer's exhibits, "E-." Prior to the order of this tribunal dated August 2, 2001, which was issued pursuant to the Preliminary Injunction Order dated February 9, 2001, in *Nat'l Mining Ass'n v. Chao*, No. 00-CV03086 (D.D.C., Feb. 9, 2001), requesting that all parties brief the issues of whether the amendments of the regulatory provisions at §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), and 718.205(d) would affect the outcome of this claim, Employer filed a Motion to Hold in Abeyance the claim pending a decision by the United States District Court for the District of Columbia concerning the amended regulations. Since the injunction was lifted as of August 9, 2001, the issues subject to the briefing order are moot, and the amendments to Part 718, published in Fed. Regis. Vol. 65, No. 245, Wednesday, Dec. 20, 2000, which became effective on January 19, 2001, are applicable in accordance with their terms in this case, which was pending on the effective date of the amended regulations.

1. Whether there has been a mistake in a determination of fact in the previous denial of benefits in the survivor's claim?
2. Whether the Miner suffered from coal workers' pneumoconiosis which arose out of his coal mine employment?
3. Whether the Miner's death was due to coal workers' pneumoconiosis?

Findings of Fact and Conclusions of Law

Modification

Any party to a black lung claim may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of the claim. §725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact" the terms of an award or the decision to deny benefits may be reconsidered on the merits. §725.310.² In a survivor's claim the sole ground for modification is that there has been a mistake in a determination of fact. This is because there can be no change in the deceased miner's condition.

In *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), the United States Supreme Court held that an administrative law judge should review all evidence of record to determine if there has been, with respect to a request for modification, a mistake in a determination of fact. In considering a motion for modification, the administrative law judge is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Circuit 1993); *Director, OWCP v. Drummond Coal Company (Cornelius)*, 831 F.2d 240 (11th Circuit 1987).

Medical Evidence Submitted with Claimant's Request for Modification

Medical Opinions

The record contains medical reports dated November 30, 1995 through February 23, 1999 prepared by Dr. M.R. Javed, board-certified in internal medicine and the subspecialty of cardiovascular disease.³ (D-33). The medical records document the Miner's treatment for

² The regulations of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §922, are incorporated into the Black Lung Benefits Act by 33 U.S.C. §932(a), and provide statutory authority to modify orders and awards.

³ The credentials Dr. M.R. Javed are not of record. However, this tribunal takes judicial notice that his relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at <http://www.abms.org>. See *Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

atherosclerotic heart disease, severe aortic stenosis, hypertension, pneumoconiosis, osteoarthritis, CVA, degenerative arthritis, anxiety disorder, bronchitis, and weakness.

Dr. Joseph F. Tomashefski, board-certified in anatomic and clinical pathology, reviewed extensive medical evidence including pulmonary function and arterial blood gas studies, physical examinations, chest x-ray interpretations, autopsy reports and slide reviews, Dr. Javed's office notes from 1995 through 1999, hospital records, the Miner's death certificate, and the nineteen slides prepared from the Miner's autopsy for his February 26, 2001 report. (D-39). Based on his review of the slides, Dr. Tomashefski found that the Miner's lung tissue indicates moderate irregular and perivascular interstitial fibrosis with alveolar remodeling. He noted, *inter alia*, a mild degree of black pigment in the pleura and around blood vessels, but that no definitive coal macules or micronodules were observed. He also noted that within the Miner's lymph nodes were scattered hyalinized nodules that contain birefringent crystals, consistent with silica. Based on review of the medical records and autopsy slides, Dr. Tomashefski opined that the Miner had severe atherosclerotic, valvular, and hyperintensive cardiac disease, with signs and symptoms of congestive heart failure, cardiac arrhythmia and angina pectoris.

The slides of lung tissue indicate moderately severe interstitial fibrosis with numerous hemosiderin-laden macrophages ("heart failure cells"). Dr. Tomashefski stated that the cause of the interstitial pulmonary fibrosis could not be determined with certainty; however he opined that secondary fibrosis due to chronic congestive heart failure and aortic stenosis was a probable significant contributory factor. He opined that the pattern of fibrosis was not that of progressive massive fibrosis. Since he did not identify coal macules in the Miner's lung tissue, it was Dr. Tomashefski's opinion that the Miner did not have coal workers' pneumoconiosis. He further stated that the slides from the lymph nodes demonstrated silicotic nodules, a marker for silica exposure. However, because he did not find silica nodules in the Miner's lung parenchyma, Dr. Tomashefski opined that the Miner did not have pulmonary silicosis. Finally, in regard to the slides, Dr. Tomashefski opined that the Miner's diffuse interstitial pulmonary fibrosis was not caused by coal dust or silica exposure because there was minimal pigment or birefringent particles in the fibrotic areas.

Since the autopsy was limited to the Miner's lungs, Dr. Tomashefski could not anatomically determine the cause of his death. However, based on review of the medical records and lung tissue changes, he opined that it was reasonable to assume that the Miner's sudden death was cardiac in nature, noting that both aortic stenosis and atherosclerotic coronary artery disease are associated with sudden cardiac death. Since he did not find that the Miner had coal workers' pneumoconiosis, Dr. Tomashefski opined that it did not cause or contribute to his death, nor was it a cause of respiratory impairment or exercise limitation. Because neither coal mine employment nor coal dust exposure is a cause of atherosclerotic cardiovascular disease, aortic stenosis or cerebral stroke, Dr. Tomashefski concluded that the Miner's death was unrelated to his former coal mine employment.

Dr. James R. Castle, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed extensive medical evidence including the evidence of the living miner's claim,

pulmonary function and arterial blood gas studies, physical examinations, chest x-ray interpretations, autopsy reports and slide reviews, Dr. Javed's office notes from 1995 through 1999, hospital records, and the Miner's death certificate for his July 12, 2001 report. (E-1). Based on review of all the evidence before him, Dr. Castle opined that the Miner probably had pathologic evidence of very minimal simple coal workers' pneumoconiosis. He further opined that the Miner's coal workers' pneumoconiosis was of such minimal severity that it did not have any impact on his physiologic function during life. Dr. Castle stated that the Miner was clearly not permanently and totally disabled as a result of any pulmonary process including coal workers' pneumoconiosis. Dr. Castle based this conclusion on the Miner's normal physiologic function and normal blood gases obtained during his baseline during life. Dr. Castle noted that the pathologists and the Miner's treating physician opined that the Miner's death was due to a massive, sudden myocardial infarction due to atherosclerotic coronary artery disease. Dr. Castle concluded his report by reiterating his findings that the Miner probably had pathologic evidence of simple coal workers' pneumoconiosis, that he had no respiratory impairment during life related to pneumoconiosis, and that he died as a result of a sudden, acute myocardial infarction due to coronary artery disease and possibly contributed to by aortic stenosis. He further opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the Miner's death in any way, and that he would have died as and when he did regardless of his occupational history and regardless of the finding of coal workers' pneumoconiosis pathologically.

Conclusions of Law and Discussion

Previously Submitted Evidence--Reviewed Here for a Mistake in a Determination of Fact

The evidence submitted with the survivor's claim is found in Director's Exhibits 3-through 25, and 40 and 41, which comprise the Miner's two previous claims.⁴ On October 27, 1999, the District Director denied the survivor's claim because the evidence did not show that the Miner's death was due to pneumoconiosis (D-26). This tribunal has reviewed the relevant evidence and finds that no mistake in a determination of fact is apparent in the District Director's conclusion that, while the Miner had pneumoconiosis which arose out of his coal mine employment, it was neither a cause nor a factor in his death.

Evidence submitted with the survivor's claim included seven hospital admission reports dated from August 1998 through April 1999, nine chest x-rays corresponding to those hospital admissions, the deceased Miner's death certificate and autopsy report, and the consultative report of Dr. Richard L. Naeye based on his review of the autopsy evidence. The Miner's multiple hospitalizations related to unstable angina, congestive heart failure, acute bronchitis, and chronic obstructive pulmonary disease with acute exacerbation. The Miner's historic diagnosis of pneumoconiosis is documented

⁴ Though the evidence pertinent to the Miner's claim is part of the record, it is not directly probative of the contested factual issues pertinent to the survivor's claim before this tribunal, and is significant only insofar as it affected the professional opinions of the opining physicians which were before the District Director and, therefore, this tribunal.

in the related reports. (D-7 through 15). The corresponding x-rays document cardiomegaly, hyperinflation, chronic interstitial lung disease, pleural thickening, fibrotic changes, and findings compatible with congestive heart failure (D-17 through 25). In regard to the pathological existence of pneumoconiosis, the autopsy evidence established that the Miner had simple coal worker's pneumoconiosis under §718.202(a)(2) (D5). The autopsy prosector, Dr. Larry Joyce, found evidence of coal macules and diffuse rare silicotic nodules (D-5). Based on a finding of two micro nodular lesions of possible silicotic origin in seventeen pieces of lung tissue, Dr. Naeye opined that the Miner may have qualified for the diagnosis of very mild simple coal workers' pneumoconiosis. Dr. Naeye further opined that those micronodules were too small and too few in number to have produced any abnormalities in lung function or to have caused any disability which would have contributed in any way to the Miner's death. (D-6). As the record contained no evidence to the contrary, the District Director correctly determined that the Miner suffered from coal workers' pneumoconiosis.

Pursuant to §718.203(b), a miner is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, the Miner's Social Security records establish, and the District Director found, that he completed at least twenty-four years of coal mine employment. Thus, because the Claimant established that the Miner suffered from pneumoconiosis, she was entitled to invoke the rebuttable presumption that the Miner's pneumoconiosis arose from his coal mine employment under the provisions of §718.203(b). (D-3). The evidence of record does not rebut the presumption. Accordingly, the District Director credited Claimant with the presumption that the Miner's pneumoconiosis arose out of his coal mine employment. There is no apparent mistake in a determination of fact regarding this element of entitlement.

The District Director was correct in finding that the evidence of record did not support a finding that the Miner's death was due to his pneumoconiosis. According to the deceased Miner's death certificate, which was prepared by Dr. James H. McVey, the Miner died on April 30, 1999, at the age of sixty-two in Richlands, Virginia. Dr. McVey listed the Miner's immediate cause of death as cardiopulmonary arrest and massive myocardial infarction (D-4). Pneumoconiosis in any form is not mentioned.

The autopsy report also does not establish that the Miner's death was due to pneumoconiosis. After performing an autopsy limited to examination of the lungs, Dr. Joyce concluded that the findings demonstrated extensive bilateral fibrous pleural adhesions, diffuse coal worker's pneumoconiosis, diffuse emphysematous changes, and multiple foci of interstitial fibrosis. He also made findings supportive of a diagnosis of congestive heart failure and pulmonary hypertension. Dr. Joyce attributed the Miner's death solely to cardiopulmonary arrest, and without reference to pneumoconiosis. (D-5). Dr. Naeye opined that the Miner's death was due to a combination of very serious cardiac disorders, any one of which could have led to death. He further opined that the Miner would have died at the same time and in the same way if he had never mined coal. (D-6). Accordingly, the autopsy evidence conclusively establishes that the Miner's death was due to cardiopulmonary arrest, and that his diffuse simple coal worker's pneumoconiosis neither caused, contributed to, or hastened the Miner's death.

Upon review of the evidence before the District Director in the survivor's claim as initially filed and denied, this tribunal has found no apparent mistake in a determination of fact. The preponderance of the evidence overwhelmingly establishes that the Miner had diffuse simple coal worker's pneumoconiosis which neither caused, contributed to, or hastened the Miner's death due to cardiopulmonary arrest and massive myocardial infarction.

Medical Evidence Submitted with Claimant's Request for Modification --Reviewed for a Mistake in a Determination of Fact

The evidence submitted with Claimant's request for modification of the denial of her survivor's claim is generally consistent with that already contained within the record and does not indicate that a mistake in a determination of fact was made in the previous denial of this claim. The preponderance of the evidence submitted with this request for modification establishes that the Miner had coal workers' pneumoconiosis entitling him to the rebuttable presumption at §718.203(b) that his coal workers' pneumoconiosis arose out of his coal mine employment. The evidence also establishes that the Miner's death was cardiac in nature and directly due to a massive myocardial infarction. Dr. Castle, board-certified in internal medicine and the subspecialty of pulmonary diseases, and Dr. Tomashefski, board-certified in clinical and anatomical pathology, both reviewed extensive medical evidence, including the autopsy evidence, and concluded that the Miner's death was cardiac in nature and related to the Miner's aortic stenosis, chronic congestive heart failure, and arteriosclerotic heart disease. Because Dr. Tomashefski could not identify coal macules in the Miner's lung tissue, he opined that the Miner did not have coal workers' pneumoconiosis, and that it, therefore, could not have caused or contributed to his death. Dr. Castle opined that the Miner's pneumoconiosis was of such minimal severity that it did not have any impact on his physiologic function during life, as evidenced by the Miner's normal physiologic function and normal blood gases obtained during his life. He further opined that the Miner's pneumoconiosis did not cause, contribute to, or hasten his death. (D-1, 6). The medical records submitted with this request for modification that document the Miner's treatment for various diseases support a finding of pneumoconiosis, but do not relate information relevant to the issue of whether the Miner's death was related to his pneumoconiosis in any way (D-33). Accordingly, the newly submitted evidence does not indicate that a mistake in a determination of fact was made by the District Director in this claim, or on the merits based on review of the entire evidentiary record, that the Miner's death could be attributed in any way to pneumoconiosis.

Attorney's Fee

The award of an attorney's fee under the Act will be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

Claimant Ruth B. Hess's request for modification of the prior denial of her survivor's claim for black lung benefits is denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20001.